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In The
Supreme Court of the United States
October Term, 1988

MARKET STREET MISSION,

Appellant,
vs.

BUREAU OF ROOMING AND BOARDING HOUSE
STANDARDS, DEPARTMENT OF COMMUNITY
AFFAIRS, STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW
JERSEY

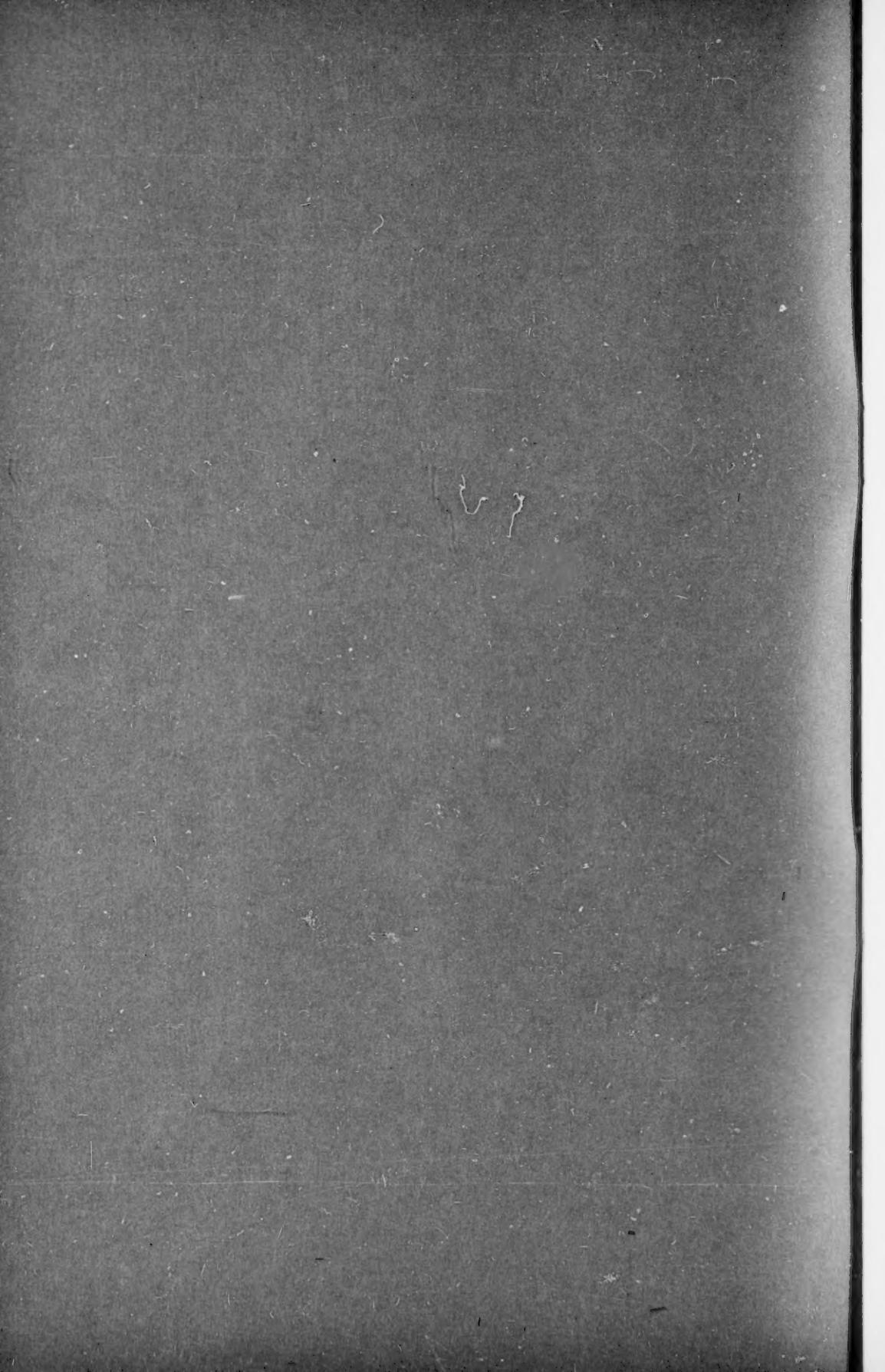
MOTION OF APPELLEE TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Does Market Street Mission have the right, under the Free Exercise Clause or the Establishment Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, to operate a boarding facility for homeless and socially handicapped individuals without complying with a State statute which provides standards for the health and safety of boarding facilities and which protects the residents of these facilities from abuse and exploitation, where the statute and pertinent regulations apply generally to all boarding houses and do not conflict with any religious beliefs of the Mission, and where they create rights in third parties, namely residents of boarding houses, which would be sacrificed if the Mission were exempted from the law?

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STANDARDS, DEPARTMENT OF COMMUNITY  
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**ON APPEAL FROM THE SUPREME COURT OF NEW  
JERSEY**

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**MOTION OF APPELLEE TO DISMISS OR AFFIRM**

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The appellee respectfully moves pursuant to Rule 16(1)(b) and (d) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey on the grounds that the constitutional questions presented are so insubstantial as to obviate the need for further review, and also because the case does not raise any issues of

special importance, does not conflict with federal precedent, and was correctly decided below.

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### COUNTERSTATEMENT OF THE CASE

In response to several tragic fires that occurred in New Jersey boarding facilities and which resulted in fatalities, the New Jersey Legislature enacted the Rooming and Boarding House Act of 1979, *N.J.S.A. 55:13B-1 et seq.* (hereinafter "Act") (Aa8).\* The Legislature found in part that the residents of these facilities were predominately the poor, elderly, and disabled and were in need of social, personal, and financial services and protection from building hazards and from unscrupulous and predatory neighbors. *N.J.S.A. 55:13B-2.*

A "boarding house" includes facilities which contain two or more units of dwelling space arranged or intended for single room occupancy, which offer the residents financial services or personal services such as meals, and at which more than 15% of residents remain for more than 90 days. *N.J.S.A. 55:13B-3(a), (c), (d), (g), (i), (j).* A "rooming house" is a facility which does not offer financial or personal services. *N.J.S.A. 55:13B-3(h).* Excluded from the Act are foster homes, community residences for the developmentally disabled or for the mentally ill, dormitories owned or operated by nonprofit educational institutions for the exclusive use of their students, facilities occupied exclusively by college students, facilities

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\* "Aa" refers to the appendix to appellant's jurisdictional statement.

under contract with State agencies, and single family residences made available to not more than six guests and which are owned or operated by a nonprofit religious or charitable institution and where the owner derives no income from the occupancy. *N.J.S.A.* 55:13B-3(c).

The Legislature mandated the Commissioner of the New Jersey Department of Community Affairs (hereinafter "Commissioner") to promulgate regulations to ensure that all rooming and boarding houses be operated to protect the health, safety, and welfare of the residents. *N.J.S.A.* 55:13B-6. These regulations are to include standards for: safety from fire; safety from structural, mechanical, plumbing, and electrical deficiencies; adequate light and ventilation; physical security; protection from harassment, fraud, and eviction without due cause; clean and reasonably comfortable surroundings; adequate personal and financial services; disclosure of owner identification; maintenance of financial and occupancy records; referral of residents if needed to social service and health agencies; assurance that no constitutional, civil or legal right will be denied the residents; reasonable access by public and private agencies to visit the residents; and an opportunity for each resident to live with as much independence, autonomy and interaction with the surrounding community as he is capable of. *N.J.S.A.* 55:13B-6(a) to (m). Further, the Act requires that these facilities to be licensed and that the Commissioner periodically inspect the facilities for compliance with the regulations. *N.J.S.A.* 55:13B-7, *N.J.S.A.* 55:13B-9. The Act also provides for its enforcement by the institution of

administrative and judicial proceedings. *N.J.S.A.* 55:13B-10, *N.J.S.A.* 55:13B-11, *N.J.S.A.* 55:13B-11.1.

The Act contains a supplemental section that includes a resident's "Bill of Rights," *N.J.S.A.* 55:13B-17 *et seq.*, which provides for the individual dignity of the residents and protects them from abuse and exploitation. The "Bill of Rights" provides that a resident has the right: to manage his own financial affairs; to wear his own clothing; to determine his own dress and hair style; to retain and use his personal property; to receive and send unopened correspondence; to reasonable access to a telephone; to privacy; to retain the services of his own physician; to communicate with any person at reasonable hours; to contact with the community; to present grievances to the facility operator and governmental agencies; to a safe and decent living environment; to refuse to perform service at the facility unless agreed to by the resident; to practice the religion of his choice; and not to be deprived of any constitutional, civil or legal right. *N.J.S.A.* 55:13B-19.

As required by the Legislature, *N.J.S.A.* 55:13B-6, the Commissioner has promulgated standards for rooming and boarding houses. *N.J.A.C.* 5:27-1.1 *et seq.* These regulations provide for: a licensing mechanism, *N.J.A.C.* 5:27-1.1 *et seq.*; the rights of the residents which essentially repeats the "Bill of Rights," *N.J.A.C.* 5:27-3.1 *et seq.*; the establishment of general building, fire safety, and security requirements; *N.J.A.C.* 5:27-4.1 *et seq.*, *N.J.A.C.* 5:27-5.1 *et seq.*, *N.J.A.C.* 5:27-6.1 *et seq.*; the establishment of nutrition and health standards, *N.J.A.C.* 5:27-7.1 *et seq.*, *N.J.A.C.* 5:27-9.1 *et seq.*; and the maintenance of records of residential and financial information. *N.J.A.C.* 5:27-8.1 *et*

*seq.* The Legislature has also provided in the Act that the regulations may be waived, modified, or postponed by the Commissioner upon application of the facility's owner if "(1) strict compliance with a regulation would result in undue hardship for the residents of the facility and (2) if granted, it would not unreasonably jeopardize the welfare of residents or the public at large." N.J.S.A. 55:13B-5(b).

Market Street Mission, a religious organization devoted, in part, to spreading the gospel to socially handicapped individuals operates a boarding house in Morristown, New Jersey, even though it has never been licensed as such (Aa35). The facility is a three-story brick building containing sleeping, eating, and living facilities for about 50 socially handicapped individuals who reside at the facility for an initial 90-day period (Aa35). While living at the facility, the residents must attend religious services and participate in work therapy (Aa6). As conceded by the Mission, the facility is a "boarding house" (Aa20 to Aa21).

The state of New Jersey has no interest in regulating or inquiring into the religious program of the Mission (Aa6). The State recognizes in its enforcement of the Act, that the Mission may lawfully require the residents of the facility to participate in its religious program as a condition of residence. The failure of a resident to participate in the program would permit the Mission to lawfully terminate a resident's occupancy. Further, the Mission has not offered the Commissioner, the New Jersey courts, or this Court the existence of any of its religious beliefs or tenets, which conflict with the Act or the regulations. Assuming such a conflict does exist, the Act provides a

mechanism to accommodate these religious beliefs, thus facilitating compliance with the Free Exercise Clause where required. N.J.S.A. 55:13B-5. These constitutionally required accommodations could be achieved by the Commissioner's promulgation of regulations which recognize the nature of the Mission's operation or by the Commissioner's waiver, modification, or postponement of particular regulations. Notwithstanding the availability of this mechanism, the Mission has sought to invalidate the entire "Act, without seeking a license which recognizes and respects its religious program.

The instant controversy began when an inspection was conducted on January 9, 1984, by the Bureau of Rooming, and Boarding House Standards (hereinafter "Bureau"), which administers the Act on behalf of the Commissioner (Aa35). The Bureau issued an inspection report and order requiring the Mission to abate certain fire safety violations at its facility by March 9, 1984 (Aa35 to Aa36). These violations included the failure to have fire rated doors, an automatic sprinkler system, a proper second means of egress, emergency lighting, automatic smoke detectors, and a fire alarm system, and the existence of a fire hazard created by improper electrical wiring (Aa36 to Aa38). Thereafter on March 12, 1984, the Bureau conducted a reinspection of the premises (Aa36). As the previously cited violations remained unabated, the Bureau assessed a penalty in the amount of \$3,050 (Aa36). Thereafter, instead of correcting the fire safety violations, which continue to exist, Market Street Mission filed an administrative appeal challenging the Bureau's jurisdiction and the applicability of the Act to religious nonprofit corporations (Aa3).

On July 12, 1985, the Administrative Law Judge issued his initial decision (Aa31 to Aa49). He concluded the even though Market Street Mission was a religious organization, its facility was a boarding house and subject to the Act (Aa42). Further, he rejected the Mission's argument that the Act as applied to the Mission violated the Religious Clauses of the First Amendment (Aa48). He also concluded that the penalty was reasonable (Aa48). On August 12, 1985, the Commissioner rendered his Final Decision and adopted the Administrative Law Judge's recommendations (Aa50). However, the Commissioner provided the penalty would be waived if the Mission submitted a license application and agreed to an abatement schedule to correct the violations (Aa50). Rather than abating the serious fire safety violations and submitting a license application, the Mission filed an appeal in the New Jersey Superior Court, Appellate Division (Aa13).

The Appellate Division issued its decision on April 23, 1987 (Aa13 to Aa30). The court noted that the Mission objected to a few of the provisions of the Act and regulations as incompatible with its religious purpose, even though the Bureau had not sought to enforce these provisions (Aa21). Specifically, the Mission objected to the right of a resident to practice the religion of his choice, to the authority of the Bureau to review its house rules and financial records, and the requirement that residents only be evicted from the facility in accordance with state law (Aa21). However, the court did not address the constitutional issues implied in this facial attack on the Act and the regulations (Aa30). The court concluded the entire

statutory and regulatory scheme was inapplicable to non-profit charitable organizations, such as the Mission, which offer their services without charge to the homeless and socially handicapped individuals (Aa26).

As the Act was clearly intended to afford protection to homeless and socially handicapped individuals, the State sought further review of the decision in the New Jersey Supreme Court (Aa4). The Supreme Court granted the State's petition for certification (Aa4). The Supreme Court on May 19, 1988, reversed the Appellate Division's decision (Aa1 to Aa12). The Supreme Court concluded that the case required a delicate balancing of secular and sacred interests, but "under New Jersey law a challenged statute will be construed to avoid constitutional invalidity if the provision is 'reasonably susceptible to such interpretation.' (citation omitted)" (Aa7). The Supreme Court concluded that the Act was remedial legislation intended to protect the health, safety, and welfare of those who reside in rooming and boarding houses (Aa8 to Aa9). Further, the Supreme Court in examining a 1985 amendment to the Act, 1985 N.J. Laws, Chap. 364, which excluded certain small boarding facilities operated by nonprofit or religious organizations, determined that the Legislature had originally intended the Act to include boarding facilities owned by religious or nonprofit organizations (Aa9 to Aa10). Accordingly, the Supreme Court found that the Legislature intended the Act to be extended as far as its constitutional reach would permit (Aa10).

In addressing the First Amendment issue the New Jersey Supreme Court stated "that religious institutions

do not enjoy an absolute immunity from worldly burdens" (Aa7). The Supreme Court in balancing the interests of the State and the interests of religious institutions stated that it would not void the Act's general requirements merely because that may be applied in an unconstitutional manner (Aa11). The Supreme Court expressed confidence that the Bureau would exercise its authority in the least restrictive manner in order to achieve the State's safety concerns and thereby avoid any excessive entanglement in religious affairs (Aa11). The Supreme Court also indicated that it would not tolerate any unnecessary intrusions by the Bureau into the religious affairs of the Mission (Aa11 to Aa12). Accordingly, the Supreme Court found "that the State's program for licensing rooming and boarding houses applies to sectarian institutions and the facially the Act neither unduly interferes with the free exercise of religion nor creates an excessive State entanglement with religion" (Aa12).

Market Street Mission on August 1, 1988, filed a Notice of Appeal with this Court pursuant to 28 U.S.C. §1257(2) (Aa51). Thereafter, the appellant filed a Jurisdictional Statement. This motion on behalf of the appellee followed.

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## ARGUMENT

AS INTERPRETED BY THE SUPREME COURT OF NEW JERSEY, THE ROOMING AND BOARDING HOUSE ACT IS INTENDED TO PROTECT THE RESIDENTS OF ROOMING AND BOARDING FACILITIES OPERATED BY RELIGIOUS AND SECULAR ORGANIZATIONS AND IT DOES NOT IMPLICATE ANY QUESTION OF CONSTITUTIONAL SIGNIFICANCE SO AS TO WARRANT PLENARY REVIEW BY THE COURT.

The appellant argues that the Religious Clauses of the First Amendment permit a sectarian organization to operate a boarding facility for homeless and socially handicapped individuals, without complying with a State statutory scheme which is intended to protect the health, safety, and welfare of these residents. Further, the Mission avers that the Act has been selectively enforced against it in violation of the Establishment Clause and the Equal Protection Clause.

This legislation was prompted by a public concern to protect the residents of these facilities, who are predominantly elderly, disabled, and poor, from building hazards and unscrupulous and predatory neighbors. N.J.S.A. 55:13B-2. The appellant would have this remedial legislation struck down so that it may offer food, clothing, and shelter to homeless and socially handicapped persons in any manner it deems appropriate.

The appellant has erroneously concluded that the Religious Clauses of the First Amendment permit a sectarian organization to care for the homeless and socially handicapped without regard to any interest the State may

have to protect their health, safety and welfare and without regard to the basic rights enjoyed by these persons. Further, the rights enjoyed by an individual do not evaporate simply because he is within the confines of a facility controlled by a religious institution. As observed by the New Jersey Supreme Court, the First Amendment does not mandate that the State's legitimate concerns end at the Mission's doors (Aa10 to Aa11). Therefore, the Religious Clauses of the First Amendment do not permit the rights of a sectarian organization to eclipse the rights of homeless and socially handicapped individuals who have turned to a religious organization for the necessities of life.

Also, the appellant has erroneously concluded that the Equal Protection Clause and the Establishment Clause require the Act to be applied to the facilities of religious institutions which do not house the homeless and socially handicapped. The appellant then concludes that the failure to apply the Act to these facilities renders the Act void. As conceded by the appellant the New Jersey Supreme Court did not address the issue (Ab6).\* However, neither the Equal Protection Clause nor the Establishment Clause requires religious facilities which are different in fact to be treated the same under law.

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\* "Ab" refers to the appellant's Jurisdictional Statement.

**A. The Act and the Regulations Which Are Intended to Protect the Health, Safety, and Welfare of Residents of Rooming and Boarding Facilities Do Not Inhibit Appellant's Free Exercise of Religion.**

Market Street Mission argues that the Free Exercise Clause requires it should be exempted from a law applicable to rooming and boarding houses, since compliance with the law will interfere with its religious mission. However, the Free Exercise Clause only prohibits the government from placing restriction on religious beliefs, not actions, even if the actions are required by a religious belief, if these actions are in violation of social duties or subversive of good order. *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

To be entitled to the protection of the Free Exercise Clause the initial inquiry is whether the claim is rooted in a religious belief. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Because a claim is made by a religious organization does not mean the claim is rooted in a religious belief. Rather, the specific religious belief or tenet held by an individual or organization must conflict with a law of general applicability. The decisions of this Court have consistently recognized that a religious belief or tenet must be the motivating factor to trigger the protection of the Free Exercise Clause. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 713-14 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402-3 (1963). Market Street Mission has been unable to show the existence of any tenet of its religious doctrine which requires it to act in conflict with statutes that protect the health, safety, and

welfare of the residents of its facility. While the Mission as part of its rehabilitation program propagates a religious message to the residents, as expressed by the New Jersey Supreme Court, the government has no interest in regulating or prohibiting this religious program (Aa6).

Even though the State has expressly disavowed any interest in the Mission's religious program, the Mission asserts that facially the Act will have a coercive impact upon its ability to operate and therefore burden the practice of its religion. As the Mission has not attempted to comply with any provision of the Act, including the correction of the fire safety violations, any coercive impact or burden is merely a hypothesis fashioned by the Mission. Assuming, however, that hypothetically the Act would impact on the ability of the Mission to continue offering food, clothing, and shelter to the public, the Free Exercise Clause does not mandate that the Mission be excused from a law of general applicability which ensures that it provide food, shelter, and clothing in a safe and adequate manner. Compliance with any law may require a religious organization to limit the scope of its religious mission. Providing the homeless and socially handicapped with adequate and safe clothing, food, and shelter may require the Mission to divert its funds or reduce its operation to comply with the applicable standards. However, such an impact does not prohibit the Mission from observing its religious tenets. This incidental impact upon the ability of the Mission to successfully operate does not violate the Free Exercise Clause. *Bob Jones University v. United States*, 461 U.S. 574, 603-4 (1983).

Even if the Act burdened the Mission's exercise of its religious beliefs the State has sufficient interest to override the religious interests claiming protection under the Free Exercise Clause. The Court has recognized that religious organizations must comply with fire, building, and health regulations. *Lemon v. Kurtzman*, 403 U.S. 603, 614 (1971). Therefore, Market Street Mission may not avoid compliance with the Act which is intended to provide for the safety, maintenance and security of its facility. Also the Act is intended to protect the homeless and socially disabled who reside in boarding facilities from abuse and exploitation. Thus, a boarding house operator may not serve the residents rancid food, require the residents to live in filthy conditions, maintain the facility with dangerous building and fire safety violations, or prevent the residents from interacting with others. The religious affiliation of an organization is not any guarantee that abuses will not occur. See, e.g., *Candy H. v. Redemption Ranch, Inc.*, 563 F. Supp 505 (M.D. Ala. 1983) [In *Candy H.* a 19-year old pregnant woman entered a religious facility to have her child. She was required to remain at the facility for a year, she could not talk to other new residents for three months, her phone calls were monitored, and her mail was censored. Further the residents were confined to the facility. *Candy H. v. Redemption Ranch, Inc.*, *supra*, 563 F. Supp. at 511.] See, also, Annotation, "Liability of Religious Associations for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination, or Related Activity," 40 A.L.R. 4th 1062 (1985). Further, the Free Exercise Clause can not be construed to permit such action even if the action is essential to the practice of a religious belief. *Reynolds v. United States*, *supra*, 98 U.S. at 164; *Sherbert v.*

*Verner, supra*, 374 U.S. at 403. The State has a substantial and compelling interest in protecting the homeless and socially handicapped from abuses that may arise in rooming and boarding facilities even if these abuses may be carried out by a religious organization. Indeed, the homeless and socially handicapped have an essential interest in being protected from harm and abuses, even if the harm and abuses are inflicted upon them by a religious organization.

In granting an individual or organization an exemption from a law of general applicability because the law would violate the Free Exercise Clause, the Court has done so only when the exemption would not directly and adversely impact upon third parties. Thus, in *Thomas v. Review Bd. of Indiana Employment Security Div.*, *supra*, the Court found that an individual was wrongfully denied unemployment compensation after he quit his employment because he was transferred to a position which required him to manufacture armaments contrary to his religious belief. Similarly, in *Sherbert v. Verner, supra*, the Court held that an employee who was discharged from her employment because she refused to work on her Sabbath, was wrongfully denied unemployment compensation. In *Wisconsin v. Yoder, supra*, the Court granted an exemption to a State compulsory education law, since the tenets of the Old Order Amish prohibited children from attending school beyond the eighth grade. In contrast, when the exemption would directly impact upon third parties or important public policies the Court has not granted an exception to a law of general applicability even if the law conflicted with an individual's or organization's religious beliefs. Accordingly, in *Gillette v. United*

*States*, 401 U.S. 437 (1971), the Court refused to grant a constitutional exemption from the Selective Service laws to a person who objected on religious grounds to serving in "unjust" wars. In *United States v. Lee*, 455 U.S. 252 (1982), the Court refused to excuse an Amish farmer from paying social security taxes for his Amish employees, even though the payment of the taxes violated his religious beliefs. Further, the Court in *Bob Jones University v. United States*, *supra*, held that the Internal Revenue Service acted properly in denying tax exempt status to a religious university which practiced racial discrimination, even though the practice was mandated by its religious beliefs.

The decisions of the Court illustrate that in balancing the interests of the State and the religious interests of an individual or organization, religious interests will not prevail if non-compliance would adversely affect a third party or an essential public policy, or where the law in issue does not actually conflict with religious beliefs. Examining the current controversy in this context, the Act provides residents of boarding facilities with the right to live in a safe environment and to be free from abuse and exploitation. An exemption from compliance with this Act would recognize that a religious belief may permit the homeless and socially handicapped to be denied these rights merely because they have sought food, shelter, and clothing from a religious organization. The Free Exercise Clause does not compel this result.

As determined by the New Jersey Supreme Court, the Act is to be enforced in a manner which does not intrude into the Mission's religious affairs. This least

restrictive means is achieved through licensure and periodic inspections of rooming and boarding facilities. Absent licensure and periodic inspection of these facilities the State would lack essential knowledge of whether the health, safety, and welfare of the residents were being protected. *State ex rel. v. Heart Ministries, Inc.*, 607 P.2d 1102, 1111 (Kan. 1980), appeal dismissed, 449 U.S. 82 (1980). To carve an exclusion out of this legislative scheme for facilities operated by religious organizations would place the residents of these facilities at the complete whim of the operator. The result would be that the secular activity of providing clothing, food, and shelter would be governed exclusively by the religious organization with the State being unable to peer beyond the Mission's door. As determined by the Supreme Court of New Jersey such a result is not compelled by the Free Exercise Clause. Accordingly, there exists insufficient reason to further review this determination.

**B. The Act and Regulations,  
Which Are Intended to Protect  
the Health, Safety, and Welfare  
of Residents of Rooming and  
Boarding Facilities Do Not  
Result In A Violation of the  
Establishment Clause.**

Appellant's argument that the Act and regulations, and the Bureau's enforcement of the Act and regulations, violate the Establishment Clause of the First Amendment is likewise lacking in merit. Since 1971 this Court has with few exceptions utilized the *Lemon* test to determine whether a law violates the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under that test a law does not violate the Establishment Clause if it has a

secular purpose, if its primary effect neither advances nor inhibits religion, and it does not foster excessive government entanglement with religion. The Mission does not argue that the Act does not have a secular purpose (Ab11). However, the appellant argues that the Act and regulations excessively entangle the State in the Mission's religious affairs.

Obviously, the Act and regulations do not have the primary effect of advancing religion. Rather the primary effect is to maintain the health, safety, and welfare of the residents of rooming and boarding houses. This is not undercut by a provision in the Act's "Bill of Rights" protecting the residents' religious freedom. The protection of the religious freedom of the residents is a small part of the Act and a legitimate public purpose, and should not be construed as the promotion of religion in violation of the Establishment Clause. Equally important in this case is that this provision should not, and will not, be applied to the Mission so as to impinge upon its religious program.

In turning to the excessive entanglement argument the periodic health and safety inspections required by the Act do not involve the State in the examination of the religious message disseminated at the Mission. It is this involvement which results in excessive entanglement in religious affairs. *Aguilar v. Felton*, 473 U.S. 402, 409-14 (1985). The State's periodic inspection of the Mission's facility to ensure that the residents are being provided safe shelter, adequate food and clothing, and that the residents are not being abused or exploited is not excessive entanglement proscribed by the Establishment Clause. *Lemon v. Kurtzman, supra*, 403 U.S. at 614 (1971).

The secular activity of providing food, shelter and clothing to the homeless and socially handicapped can not be equated with the teaching of a religious doctrine. *Bowen v. Kendrick*, 487 U.S. \_\_\_, \_\_\_ 108 S.Ct. 2562, 2582, 101 L.Ed.2d 520, 550 (1988) (O'Connor, J., concurring); cf. *State ex rel. v. Heart Ministries, Inc.*, *supra*, 607 P.2d at 1111. While these good works may be performed as a result of the adherence to a religious belief, these secular activities do not become religious and outside of State regulation. The Mission's argument if accepted would permit the operation of a hospital or a soup kitchen which is motivated by an organization's religious belief to help others, to be free from any State health, fire, or building regulation which protects the recipients of the organization's good works. The erection of this absolute wall of separation is far beyond what is required by the Establishment Clause. *Lemon v. Kurtzman*, *supra*, 403 U.S. at 614.

Any conjecture by the Mission as to excessive entanglement is unfounded. The Bureau has not made any attempt to examine or otherwise inquire into the religious beliefs of the Mission. Further, the Bureau does not intend to examine or inquire into these religious beliefs. Nor is it necessary to review or evaluate the religious beliefs or programs of the Mission to determine if it provides adequate and safe shelter and food, or the other rights afforded by the Act. The Supreme Court of New Jersey in rejecting the facial attack on the Act, stated that it would not render a statute invalid on First Amendment grounds in anticipation of a possible unconstitutional application. This is consistent with the decisions of this Court. *Bowen v. Kendrick*, *supra*, 487 U.S. at \_\_\_ 108 S.Ct. at 2575, 101 L.Ed.2d at 542; *Roemer v. Maryland Public*

*Works Bd.*, 426 U.S. 736, 761 (1976). Further, the Supreme Court of New Jersey clearly directed the Bureau to proceed in a manner so as not to intrude into the religious affairs of the Mission. Thus, the Supreme Court of New Jersey correctly held that there is no basis to assume that the State will overstep its legal bounds and intrude into the religious affairs of the Mission or otherwise scrutinize the religious message being disseminated by the Mission. There is nothing in the record to support the Mission's speculation that the State is intent on implementing the Act in violation of the Establishment Clause. Therefore, there exists insufficient reasons to further review the determination of the New Jersey Supreme Court.

**C. There Exists no Evidence in the Record to Support the Appellant's Claim of Discrimination Enforcement in Violation of the Establishment Clause or of the Equal Protection Clause and the Act Does Not Violate the Equal Protection Clause.**

The Equal Protection Clause does not require that a statute apply equally to all persons. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). Further, the Equal Protection Clause does not require that things different in fact be treated in law as if they were the same. *Ibid.* In determining whether the Equal Protection Clause is violated different levels of scrutiny are utilized. If a fundamental right or suspect class is involved, the legislation is subject to "strict scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Strict scrutiny requires the State to demonstrate that a compelling need justifies the legislation and that no less restrictive alternative will accomplish the State's

objective. *Ibid.* The other test is the "rational basis" test. Under this test the legislation must address a legitimate State objective and the classification selected must be rationally related to the legislative objective. *Graham v. Richardson, supra*, 403 U.S. at 371-72. While the right to the free exercise of religion is a fundamental right the Court's inquiry should be limited to the rational basis test unless the Court concludes that the legislation does in fact violate the claimant's free exercise of religion. *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974). As the Act does not violate the Mission's free exercise of religion the rational basis test is the appropriate review standard.

Only one decision of this Court has invalidated a law on the basis of discriminatory enforcement among religious denominations in violation of the Establishment Clause. *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson*, the Court found unconstitutional a statute which exempted religious organizations, which received 50 percent of their total contributions from their members, from the registration requirement imposed upon charitable institutions. The Court held that the 50 percent rule granted a denominational preference to well established religious organizations and that the State was unable to demonstrate a compelling reason to justify the rule. *Larson v. Valente, supra*, 456 U.S. at 244-55. However, unlike the *Larson* situation, the present Act focuses upon facilities both religious and secular, which provide room and board to the poor, elderly, and disabled and make no distinction based upon the religious affiliation of the organization.

The appellant, without any reference to the factual record below, broadly avers that the Bureau has discriminated by enforcing the Act against certain religious denominations and not against other religious denominations. To support this argument the Mission relies upon its previously advanced argument that the Bureau's alleged discriminatory action had the primary effect of inhibiting its religion in violation of the Establishment Clause (Ab11 n.5.). The Mission offers absolutely no evidence in this proceeding concerning the other religious facilities upon which it bases this argument. More particularly it offers no evidence that any other facility fell within the definition of "rooming and boarding house" so as to be subject to the Act. This argument was not and could not be given consideration by the courts below without such proof, and New Jersey contends there is no proof to support such a claim of discrimination. It is submitted that the failure of the New Jersey courts to even make a passing reference to this argument suggests the absence of any evidence in the record to support the claim.

A religious institution, such as the Mission, which offers its boarding facility to members of the public who are homeless and socially handicapped is differently situated from a facility which houses a rabbi, minister, or priest and his family, or a group of individuals who are primarily engaged in the dissemination of a religious doctrine. The Act is intended to protect the residents of the former facility. N.J.S.A. 55:13B-2. The homeless and socially handicapped who reside in the Mission's facility are the recipients of the good works of those who are engaged in the dissemination of a religious doctrine. The

homeless and socially handicapped are not engaged in pedagogy, rather they are receiving from their religious benefactors the necessities of life. The Mission's facility is more akin to a soup kitchen or hospital operated by a religious organization in which the public benefits from the good works of a religious organization. The fact that a facility which offers secular service to the public, such as a boarding house, soup kitchen, or hospital, is affiliated with a religious organization does not require that laws be fashioned to reach religious organizations which are not engaged in these types of activities. Further, any "convent, rectory, seminary, or monastery" which operates a large boarding facility for the homeless and socially handicapped would be subject to the Act. The Act is intended to protect these persons from harm and abuse, whether the harm and abuse are inflicted upon them by a religious or secular organization. New Jersey has a compelling interest to protect the homeless and socially handicapped persons who are housed in facilities operated by religious institutions whether these individuals reside in a facility called a "convent, rectory, seminary, monastery, or Mission." Therefore, there exists insufficient reasons to further review the determination of the New Jersey Supreme Court.

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## CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed because the constitutional questions presented are so insubstantial as to not require further review, and also because the case does not raise any issue of special importance, does not conflict with federal precedent, and was correctly decided below.

Respectfully submitted,

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